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Fisheries Management
Fishing, Scientific Research Permits, and Letters of Acknowledgment

IMPROVING THE EXEMPTED FISHING PERMIT PROCESS AND REVISING DEFINITIONS RELATED TO RESEARCH ACTIVITIES IN NMFS

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Improving the Exempted Fishing Permit Process and Revising Definitions Related to Research Activities in the National Marine Fisheries Service

Introduction

The research and development of new fishing methods is an important aspect of managing sustainable fisheries. Where such research activity is technically defined as "fishing", rather than "scientific research" under current National Marine Fisheries Service (NOAA Fisheries) regulations, a temporary exemption from fishing regulations is required. Two forms of such exemptions exist: a Scientific Research Permit (SRP) given to researchers conducting NOAA-controlled scientific research activity on board scientific research vessels[1], and an Exempted Fishing Permit (EFP) given to all other researchers proposing to conduct fishing activity that is otherwise restricted. Researchers conducting non-NOAA-controlled scientific research as defined by regulations at 50 CFR 600.745 do not need to obtain such an exemption, but may apply to NOAA Fisheries for a Letter of Acknowledgment (LOA) that their research is considered bona fide. A LOA provides a "seal of approval" which can ease any interaction between researchers and enforcement personnel at sea.

The number of applications for EFPs, SRPs, and LOAs has markedly increased over the past year, and three major issues have emerged:

- Researchers and commercial fishers have complained about the difficulties of obtaining timely exemptions. This has put pressure on the agency to speed up the process for obtaining an EFP.

- NOAA reviewers, such as NOAA Office of Strategic Planning (NOAA PPI/SP) and the NOAA General Counsel for Fisheries (GCF), have raised concerns about the potential cumulative environmental effects of exempted fishing activity. Therefore, NOAA PPI/SP and GCF have advised the agency to closely examine the cumulative environmental impacts of EFPs through Environmental Assessments (EAs) and Environmental Impact Statements (EISs).

- There is concern both from within and outside the agency that EFPs may be used to extend the fishing season for restricted species or to fish in closed areas, since part of a researcher's compensation may be in the form of the keeping-for-sale of any catch. This has put pressure on the agency to ensure a more robust EFP/SRP process such that only scientifically valid projects are permitted.

Furthermore, the increase in cooperative research has resulted in an increase in public visibility. NOAA Fisheries is faced with the difficulty of balancing these potentially competing pressures.

Consequently, NOAA Fisheries, in consultation with NOAA PPI/SP and GCF, is considering measures to restructure the permitting and LOA process. These measures include: (I) minimizing the number of reviews; (II) reconsidering options for the public comment and

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[1] 'Scientific research vessel' means a vessel owned or chartered by, and controlled by, a foreign government agency, U.S. Government agency (including NOAA or institutions designated as federally funded research and development centers), U.S. state or territorial agency, university (or other educational institution accredited by a recognized national or international accreditation body), international treaty organization, or scientific institution. In order for a vessel that is owned or chartered and controlled by a foreign government to meet this definition, the vessel must have scientific research as its exclusive mission during the scientific cruise in question and the vessel operations must be conducted in accordance with a scientific research plan.

clearance process; (III) enhancing National Environmental Policy Act (NEPA) efficiency; and (IV) revising definitions that govern the EFP/SRP/LOA process. In this paper, NOAA Fisheries examines ways to simultaneously improve the efficiency of the EFP/SRP/LOA process while maintaining sound science and management practices.

Background

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) exempts scientific research conducted by a scientific research vessel from the definition of "fishing." Procedures evolved whereby a Science Center Director would provide domestic researchers with LOAs, formally referred to as "Letters of Authorization," but subsequently changed to "Letters of Acknowledgment," to conduct scientific research in the Exclusive Economic Zone (EEZ). However, these letters followed no specific format and were subject to misinterpretation and abuse, resulting in several enforcement cases, some involving NOAA personnel. Similarly, experimental (now called exempted) fishing permit procedures varied widely, depending on the fishery being regulated, and did not always provide for adequate public input or scrutiny. Therefore, on December 31, 1992, the Assistant Administrator, NOAA Fisheries (AA) issued a memorandum requiring Headquarters-level review of LOAs and experimental (exempted) fishing applications. Decision memoranda and determinations about the applicability of other laws were required to be submitted to the Office of Conservation and Management (now the Office of Sustainable Fisheries (F/SF)). The memorandum also set in motion changes to the foreign and domestic fishing regulations to address these issues.

Based on continuing problems and questions regarding these issues and needs identified by the Department of Commerce Inspector General, NOAA Fisheries conducted a management control review (MCR), completed in September 1995, on the scientific research and experimental fishing permitting process. The MCR team identified some areas where controls should be strengthened to foster good management of EFPs and meet Government Accounting Office standards for Executive Agencies. Among other areas needing strengthening, the MCR team identified the following:

RECORDING

Finding: The Headquarters, Regional Offices and Centers do not completely and consistently record transactions and other significant events associated with the permitting process. This includes the entire process, from initiation of a contact (such as an informal inquiry) through all subsequent transactions to final classification (such as the Foreign Research Vessel Data Form in the Alaska Fisheries Science Center.)

Problem: Pertinent information may not be available to NMFS management in order to control operations and make decisions. Applications may not be processed on a timely basis, and this may inhibit legitimate research.

Issue: How should transactions and events be recorded (such as assigning a control number to an application upon receipt?). What summary progress and performance reports should be prepared (such as Quarterly Reports by the Director to the AA?)

REPORTING

Finding: Procedures for the exchange of data and reports are not always clearly stated in the applications for EFPs. Some EFPs require that data must be shared with everyone, while others hold most information in confidence. The Regions impose very different data reporting

requirements in EFPs themselves; for example, reporting requirements vary from none (for mahogany quahogs) to extensive logbooks and daily reports (for salmon). The Centers do not always (and perhaps cannot legally) require a verbal or written cruise report when a "scientific research" project has been completed.

Problem: The results of useful research may not be recorded or reported to NMFS.

Issue: What standard reporting requirements, if any, should NMFS impose on applicants in EFPs? In research plans? How should these reporting requirements be met?

The MCR recommended that NOAA Fisheries: (1) prepare a policy determination on the disposition of catch; (2) adopt measures to better control scientific research, including the take of depressed stocks, endangered species, and marine mammals through adequate research plans; (3) adopt a consistent definition of "scientific research"; (4) adopt consistent requirements for tracking and review of LOAs and EFPs at the Headquarters and Regional levels; (5) standardize and streamline the review of LOAs and EFPs; (6) better record the receipt of applications and issuance of LOAs and EFPs; and (7) standardize reporting requirements for LOAs and EFPs.

On May 28, 1996, NOAA Fisheries issued regulations at 61 FR 26435 addressing scientific research, exempted fishing, and exempted educational activities, which resolved many issues identified in the 1995 MCR. The regulations defined scientific research, requested research plans as part of a request for a LOA, established national procedures for obtaining LOAs and EFPs, and required reports from LOA and EFP holders (requested reports in the case of LOAs). The regulations are codified at 50 CFR Part 600. Individual regulations specific to the FMPs are codified at 50 CFR 635.32 (Atlantic Highly Migratory Species); 648.12 (Northeast); 660.17, 660.406, and 660.516 (Fisheries Off West Coast States and in the Western Pacific), and 679.6 (Fisheries of the Exclusive Economic Zone Off Alaska). In addition, EFP regulations specific to the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA) are codified at 50 CFR 697.22.

On July 29, 1998, the AA issued a memorandum replacing the 1992 memorandum and issuing extensive guidance on the revised regulations. Finally, on April 6, 2000, the AA issued a memorandum exempting the Northeast Region from F/SF concurrence in issuance of EFPs. This did not delegate or remove any NEPA requirements.

The Current Process for Issuance of EFPs, SRPs and LOAs

Procedures regarding the authorization and/or oversight of scientific research vary according to whether research is conducted by NOAA Fisheries or by an outside source (e.g., state government, academic institution) and whether the specific activity is regulated under the Magnuson-Stevens Act or under other laws. Other laws that regulate fishing activity, the Atlantic Tunas Convention Act (ATCA), for example, do not exempt scientific research from the scope of regulatory authority. In such cases of other applicable law, NOAA Fisheries scientific research and that of external parties, may be authorized by the issuance of SRPs. There may also be other considerations, i.e., interactions with marine mammals regulated under the Marine Mammal Protection Act (MMPA) or species listed under the Endangered Species Act (ESA). Should federally funded, permitted, or conducted research activities adversely affect listed species, then a formal ESA Section 7 consultation is required.

NEPA applies to all "Major Federal actions" conducted by the Federal government or its agent, as defined under the criteria described in Section 1508.18 of the Council on Environmental

Quality (CEQ) regulations. The permitting *or* funding of NOAA activities, which includes EFPs and SRPs, falls under this criteria and requires appropriate NEPA analysis. Also, if a Federal agency funds any of the activities under an LOA, it is considered a "Major Federal action" and NEPA does apply through the grant or contract for that action. In such cases the agency also has full control via the funding mechanism, over the activities acknowledged under the LOA. If an LOA does not receive Federal funds, however, it is not subject to NEPA because the research activity is neither conducted, nor funded, by the agency.

For EFPs: EFPs are issued to researchers who are conducting activity technically defined as fishing under NOAA Fisheries regulations. Gear testing, for example, is not considered "scientific research" under the Magnuson-Stevens Act and requires an EFP. The applicant requests an EFP and supplies the NOAA Fisheries Region, Highly Migratory Species Division (HMS) of F/SF, or State-Federal Fisheries Division (SFF) of F/SF with the information as specified in the regulations at 50 CFR 600.745 or 697.22 for ACFCMA. In order for NOAA Fisheries to issue an EFP, the applicant must provide the minimum information listed under this section, e.g., the date of the application; the applicant's name, mailing address and telephone number; a statement of the purposes and goals of the exempted fishery for which an EFP is needed, including justification for issuance of the EFP; and a copy of the vessel owner's state license and registration, and other requirements. The Region/HMS/SFF reviews the application and works with the applicant to obtain all the appropriate information. Because this is an action conducted by the Federal government or its agent, NEPA applies. The Region/HMS/SFF prepares the appropriate analysis, either with or without the assistance of the applicant, and makes determinations regarding other laws, e.g., MMPA, ESA, and ATCA. The Region (this process may differ slightly for HMS) ultimately either returns the application with a letter explaining why the application does not warrant further consideration (copy to appropriate Council(s)), or forwards it to F/SF with a decision memorandum, determinations, and appropriate NEPA analysis for clearance and publication of notice of the application in the *FR* with a 15-45-day comment period. As an alternative, the *FR* notification requirement can be addressed by publishing a Council meeting notice in the *FR*, including EFPs as an agenda item.

F/SF reviews the application and/or associated NEPA analysis and forwards it through GCF for approval for legal sufficiency and through the AA and NOAA PPI/SP for final clearance on EAs and EISs. Categorical Exclusions (CEs) do not require clearance or approval for legal sufficiency, but the Regions and GCF normally consult with NOAA PPI/SP. Following completion of the comment period, F/SF reviews and submits the EA or EIS to NOAA PPI/SP for clearance. Upon concurrence on NEPA documents from NOAA PPI/SP, the Regional Administrator (RA) (or F/SF Director, in the case of HMS and SFF) may issue the EFP. In the specific case of the Northeast Region, F/SF is only responsible for submitting the *FR* notice for publication. F/SF does not review or clear a CE or the EFP application itself but does review or clear EAs and EISs.

For SRPs: SRPs are issued for research conducted by the Federal government or its agent. The Science Center Director, or designee, submits the request for a SRP with a scientific research plan (usually a cruise plan) for approval by the RA. Because this is a Federal action, NEPA applies. There are also other considerations, e.g. interactions with marine mammals regulated under the MMPA or "takes" as defined under the ESA.

For LOAs and Other Non-NOAA Fisheries Funded Scientific Research: Scientific research is not regulated under the Magnuson-Stevens Act. Therefore, researchers conducting scientific research as defined by regulations at 50 CFR 600.745 do not require authorization or approval by

NOAA Fisheries. However, a researcher may voluntarily request a LOA from the agency. A LOA is not a permit and is normally issued to the researcher by the RA, Science Center Director, or designee, once a scientific research plan has been acknowledged as legitimate scientific research by NOAA Fisheries. A LOA provides a "seal of approval" which can ease any interaction between researchers and enforcement personnel at sea. If the RA, Science Center Director, or designee identifies a concern in the research plan, s/he can request modification or decide not to issue the LOA. The RA or designee signs the letter and provides it to the applicant. By virtue of current legislation regulating fisheries activities, and because the process is voluntary, NOAA Fisheries has no means of quantifying the exact number of LOAs or their effects.

Discussion of Options

NOAA Fisheries, in consultation with NOAA PPI/SP and GCF, is considering measures to restructure the permitting and LOA process. These measures include: (I) minimizing the number of reviews; (II) reconsidering options for the public comment and clearance process; (III) enhancing NEPA efficiency; and (IV) revising definitions that govern the EFP/SRP/LOA process.

The following are options for simultaneously improving the efficiency of the EFP/SRP/LOA process while maintaining sound science and management practices. The options considered under each heading are not intended to be mutually exclusive and, where appropriate, more than one option per heading may apply.

I. Number of Reviews

Although RAs already have the authority to issue EFPs and SRPs with the authority to further delegate this function, currently only the RA of the Northeast Region has the authority to issue EFPs without F/SF concurrence (this delegation by the AA took place on April 6, 2000, as mentioned above). However, EAs and EISs require approval/disapproval by the AA with the concurrence of NOAA PPI/SP. The determination to prepare a CE versus an EA or EIS, after consultation with NOAA PPI/SP (NAO 216-6 section 5.05d), is delegated to the RA. The current structure of authority can lead to disagreements over the determination to prepare a CE versus an EA or EIS.

Option 1: Eliminate NOAA Fisheries Headquarters review of EFPs completely, including NEPA documents. Instead, F/SF would provide guidance on uniform handling of EFPs among the Regions. F/SF would facilitate transmittal of NEPA documentation to NOAA PPI/SP where appropriate. F/SF's primary role would be quality assurance (QA).

Option 2: With regard to EFPs, SRPs, and any related financial assistance, delegate NOAA Fisheries' responsible program manger responsibilities for NEPA compliance from the AA to the RA for all NEPA documents except a Programmatic EIS.

Option 3: Eliminate NOAA Fisheries Headquarters review only for EFPs that are categorically excluded from the requirement to prepare an EA or an EIS under NEPA. This would essentially apply the current process for the Northeast Region to all Regions. F/SF would provide guidance on uniform handling of EFPs among the Regions. F/SF would facilitate transmittal of NEPA documentation to NOAA PPI/SP where appropriate. F/SF's primary role would be QA.

Option 4: Delegate the authority to issue SRPs and LOAs to Science Center Directors. Procedures identifying how NEPA documents will be prepared and reviewed, as well as information exchange about the approved SRP and LOA activities, will be specified in cooperating agreements between the Regional Office and Science Center.

Recommendation:

Option 2

Rationale:

Regional responsibility and accountability are key features of the agency's efforts to streamline all regulatory actions. The agency has already begun eliminating layers of the review process through the Regulatory Streamlining Program (RSP), which focuses on delegating decision-making authority to the Regions. Revision to the agency's Operational Guidelines, development of a regulatory tracking database, and development of Regional EFP, SRP, and LOA databases are already underway; these activities are consistent with the delegation of regulatory responsibilities to the Regions and Science Centers. Option 2 will address the issue raised by researchers and commercial fishers regarding the difficulties of obtaining timely exemptions and will reinforce the agency's commitment to streamlining the process for obtaining a permit for research activities and exempted fishing.

II. Public Comment and Clearance Processes

Public notification of EFP proposals and the opportunity for public comment on these proposals is a critical part of the EFP process. It can also add to the length of time necessary to provide EFPs. In a memorandum dated October 15, 2001, to the AA from the RA of the Northeast Region several concerns were expressed pertaining to the EFP process including the need to "Improve clearance time for EFP *FR* Notices" and the need to "Increase opportunity for public notice and hearing on EFPs." The current regulations for issuance of EFPs (50 CFR 600.745) state, "Interested persons will be given a 15- to 45-day opportunity to comment and/or comments will be requested during public testimony at a Council meeting." The provisions for a comment period significantly impact the time-sensitive process for issuing EFPs. The type of notice (Notice of Receipt *versus* Notification of a Proposal) published in the *FR* impacts the length of review and processing for that notice.

The agency is examining various options for public notification and participation. Currently, NOAA Fisheries Regions and F/SF (HMS and SFF) have different ways of processing, documenting, and reviewing EFPs. HMS, for example, publishes one *FR* notice at the beginning of each year announcing the intent to issue EFPs and SRPs analyzed under the HMS Fishery Management Plan (FMP), and this has proven to be a useful streamlining method.

A. Public Comment

Option 1: Process all EFP notifications in the same fashion as meeting notices, i.e., they would go directly from the Regional Office to the F/SF5 Regulations Unit for format review and editing, and forwarding to the Office of the Federal Register. These notices would be prepared and forwarded as soon as the EFP application is received.

Option 2: Announce the receipt of all EFP applications received prior to a designated cut-off date in one notice on January 1st of each year and request comments on these EFP applications simultaneously. If this is not practicable, publishing a notice biannually would also make the process more efficient than publishing individual proposals, which can number in the hundreds. Given the variation in the timing of the receipt of applications and the scope and nature of the majority of EFP applications, this option may not be practicable for all Regions. However, it may be prudent to implement a cut-off date at a specific time of the year for providing financial assistance to EFP applicants so that the Regions can not only bundle the EFP notices, but also review the programs and consider impacts, such as cumulative effects required under NEPA, in a more efficient and timely manner.

Option 3: Publish notification of the intent to issue EFPs on an annual or quarterly basis with a summary of the environmental effects analyzed under one EA. This is similar to the approach taken by HMS for shark public display EFPs.

Option 4: Publish notification of the intent to issue EFPs and request public comment on environmental impacts as part of the scoping process.

Option 5: Publish notification of the intent to issue EFPs with a summary of the environmental effects analyzed in a Draft EA.

Option 6: Receive public comment at Council meetings, utilizing the provision in the regulations that allows for this alternative. This may speed up the EFP process by removing the 15-45 day *FR* comment period and could be done by listing the specific EFPs to be discussed in the notice of the Council meeting published in the *FR*.

Option 7: When a Council meeting or Council committee meeting notice is published, include a generic announcement that applications for EFPs may be reviewed, and public comments taken, at the meeting.

Recommendation:

Options 1, 2, 6, and 7

Rationale:

Front-loading and streamlining are integral to the success of RSP. Combining, to as great extent as possible, the comment period for the EFP application itself through a Notice of Receipt and the comment period for the related NEPA document decreases the amount of time for review. Submitting this Notice of Receipt at an earlier stage in the process, i.e., shortly after receipt of the application, would allow for comments to be considered earlier in the process, rather than at the end when the applicant's start date to conduct exempted fishing is drawing near. In addition, comments early in the process can be received while the NEPA documents are prepared, thus saving time overall. Options 1, 6, and 7 will address the issue raised by researchers and commercial fishers regarding the difficulties of obtaining timely exemptions and will reinforce the agency's commitment to streamlining the process for obtaining an EFP.

B. Clearance Process

There are several measures that NOAA Fisheries can take to expedite the clearance process for

EFPs. Since NEPA analyses need to meet the standards set forth in the CEQ NEPA regulations, review and clearance of such documents can slow down the approval of the EFP. NOAA Fisheries needs to take measures to facilitate the review and clearance process for NEPA documents and examine other areas of timeliness concern. Through these measures the agency plans to streamline the clearance process while ensuring, through cooperative agreements between the Regions and Science Centers, that only scientifically valid research is funded.

Assuming that Option 2 under "Number of Reviews" is adopted, F/SF would facilitate transmittal of NEPA documentation to NOAA PPI/SP where appropriate and F/SF would be eliminated from the HQ review process.

Option 1: Front-load all analyses as early as possible so that NOAA PPI/SP can provide comments on the document early in the process.

Option 2: Regional Offices and Science Centers will initiate cooperating agreements to ensure that permits are issued only for proposals consistent with the goals and missions of NOAA Fisheries and that contain sufficient scientific merit. In the case of SRPs and LOAs, procedures identifying how NEPA documents will be prepared and reviewed, as well as information exchange about the approved SRP and LOA activities, will also be specified in these agreements.

Option 3: With regard to EFPs, SRPs, and any related financial assistance, delegate NOAA Fisheries' responsible program manger responsibilities for NEPA compliance from the AA to the RA for all NEPA documents except a Programmatic EIS.

Option 4: Consistent with front-loading, complete one NEPA document for an applicant requesting both financial assistance and a permit, with neither federal action approved until the appropriate NEPA document is completed. Require applicants who are knowledgeable entities on NEPA or who are undertaking a unique activity to submit environmental information in the appropriate format needed by the agency to prepare an EA. All other applicants would be required to submit only that information pursuant to 50 CFR 600.745. NOAA Fisheries would then finalize the EA and submit it for concurrent review among staff in the Regional Office and Headquarters. Thorough review of the NEPA analysis at this early stage of the process would help reviewers identify problems and work with the applicant early in the process, decreasing the amount of time spent for NEPA review/approval at NOAA Fisheries Headquarters and NOAA PPI/SP in the final stage of the financial assistance approval process.

Option 5: Recommend that all Regional Offices, HMS, and SFF consider preparing EAs that analyze environmental effects by category and/or program (e.g., Cooperative Research Program), rather than by individual applicant.

Option 6: Encourage the Councils to implement a research or quota set-aside program. The Mid-Atlantic Fishery Management Council (MAFMC) and HMS, for example, have some form of quota set-aside for research or educational purposes, and the effects of these set-asides are analyzed together in one EA, in either annual specifications, in the case of MAFMC, or under an FMP, as with HMS. This would alleviate the need to prepare an individual EA for the EFP applications that are submitted under these programs.

Option 7: Encourage the Councils to make EFPs a part of the existing regulated fishery (e.g.,

the raised footrope trawl exempted whiting fishery). This would be accomplished through a regulatory or FMP amendment.

Option 8: Recommend that Regions and Science Centers consider putting a cap on the number of EFPs and SRPs that can be issued within a particular timeframe.

Recommendation:

Options 1, 2, and 3

Rationale:

Option 1 will address the issue raised by researchers and commercial fishers regarding the difficulties of obtaining timely exemptions and will reinforce the agency's commitment to streamlining the process for obtaining an EFP. Front-loading and streamlining ensured under Option 1 are integral to the success of RSP, as well as the cooperative research program. Option 2 ensures that permits are issued only for proposals consistent with the goals and missions of NOAA Fisheries and contain sufficient scientific merit. In addition, concerns raised by constituents and/or reviews such as the MCR will be decreased by a sharper focus on scientific integrity. Cooperating agreements between Regional Offices and Science Centers will help to eliminate duplicative review and establish clear procedures as recommended by the MCR. Option 2 will address the issue that EFPs may be used to extend the fishing season for restricted species or in closed areas, since part of a researcher's compensation may be in the form of the keeping for sale of any catch and will reinforce the agency's commitment to ensuring that only scientifically valid projects are permitted. Option 3 will address the issue raised by researchers and commercial fishers regarding the difficulties of obtaining timely exemptions and will reinforce the agency's commitment to streamlining the process for obtaining a permit for research activities and exempted fishing.

III. Enhancing NEPA Efficiency

NOAA PPI/SP, GCF and other reviewers have identified compliance with NEPA, and in particular with analyses of cumulative effects, as an area of major concern. Under the criteria described in Section 1508.18 of the CEQ regulations, EFPs may fall under the classification of "Major Federal actions" and require appropriate NEPA analysis. For EFPs, appropriate analysis is either an EA or a CE. EAs require approval/disapproval by the AA, whereas RAs have been delegated approval/disapproval authority on CEs. Also, the determination to prepare a CE versus an EA is left to the RA's discretion.

To improve NEPA compliance and better analyze cumulative effects, NOAA Fisheries should reevaluate its nation-wide recordkeeping and reporting methods for EFPs, SRPs, and LOAs. NOAA Fisheries needs to be able to fully track the authorization and use of EFPs and SRPs and to secure information to prepare necessary analyses, including those regarding cumulative effects. In addition, improvements in recordkeeping and reporting are necessary to meet Federal government standards for recordkeeping. Although current regulations (50 CFR 600.745) address recordkeeping and reporting, to date, these have not been uniformly applied or consistently enforced across Regions. For these reasons, developing databases for EFPs, SRPs, and LOAs is recommended.

Option 1: Standardize and centralize all forms and data recording for EFPs, SRPs, and LOAs through the use of standard forms and a centralized, national database for

collection of information and tracking of such activity.

Option 2: Encourage Regional Offices to establish an EFP, SRP, and LOA database for the tracking, recordkeeping, and analyzing of such actions.

Option 3: Where possible, each RA/Science Center Director or designee will bundle NEPA analyses and/or prepare a comprehensive programmatic EA or EIS for EFPs/SRPs, rather than prepare EAs or EISs for individual EFPs and SRPs.

Option 4: Encourage LOA recipients to share information with NOAA Fisheries, enforce the requirements that final reports be submitted by EFP recipients to NOAA Fisheries, and encourage information sharing on SRPs and LOAs between the Regional Office and Science Center.

Option 5: With regard to EFPs, SRPs, and any related financial assistance, delegate NOAA Fisheries' responsible program manger responsibilities for NEPA compliance from the AA to the RA for all NEPA documents except a Programmatic EIS.

Recommendation:

Options 2, 3, 4, and 5

Rationale: The efficiency of NEPA compliance can be improved by tracking and analyzing environmental effects of research set-asides, cooperative research, or other programs receiving financial assistance on a predictable and/or recurring basis. Including the analysis of environmental effects of EFPs and SRPs in the NEPA document prepared for a FMP or for annual specifications would also facilitate the process. The so-called "bundling" of NEPA documents would help streamline the overall EFP/SRP process. Enforcing the requirement to submit post-project reports and study results not only will assist with robust NEPA analyses but also will benefit future management decisions or recovery actions. The database is also essential for reporting on one of the performance measures in the NOAA Fisheries Strategic Plan. Option 5 will address the issue raised by researchers and commercial fishers regarding the difficulties of obtaining timely exemptions and will reinforce the agency's commitment to streamlining the process for obtaining a permit for research activities and exempted fishing.

IV. Definitions

Current regulations for "exempted fishing" at 50 CFR 600.745(b) authorize EFPs "for limited testing, public display, data collection, exploratory, health and safety, environmental cleanup, and/or hazard removal purposes, the target or incidental harvest of species managed under a FMP or fishery regulations that would otherwise be prohibited." Currently, any research focusing on changes to fishing gear requires an EFP.

The majority of EFP applications relate to gear-based research to minimize bycatch. Therefore, it is appropriate to reexamine the definition of scientific research activity to consider including research on fishing gear for scientific and conservation purposes (for example, making gear more selective to reduce bycatch). This type of activity under the revised definition would be distinguished from the testing of fishing gear for the purpose of making gear more efficient, which would still require an EFP. The lack of clarity in definitions pertaining to exempted fishing has resulted in confusion and has led to delays in the approval process. The goal is to redefine 'scientific research' as activity that is aimed at improving fishery management and to

redefine testing of fishing gear as experimentation with or testing of gear for the purpose of making the gear more economically efficient. Any change to these definitions would require notice and comment through rulemaking.

Option 1: Through nationally coordinated proposed and final rulemaking, consider modifications to EFP definitions, add new definitions, revise existing definitions for certain regulatory terms, make technical changes, and amend the requirement to publish notice of EFPs in the *FR*. Definitions could include compensation fishing, gear testing, scientific research activities, vessel observers, exempted fishing, exempted educational activities, and options for public comment. Rulemaking would clarify the terminology and applicability of EFPs and will take at least six months.

Option 2: Regulations could be revised to set overall definitions but defer to the Regions and HMS to develop necessary protocols on process.

Option 3: Prepare a proposed and final rule that would expand the definition of "scientific research" to include "conservation engineering." This rule may or may not require notice and comment rulemaking.

Recommendation:

Option 1

Rationale:

The agency is considering modifying the regulations to be consistent with current research activities and believes this option would potentially decrease the amount of staff time devoted to EFPs and increase the efficiency of processing requests. By amending regulatory definitions, such as scientific research and sale of fish, Option 1 will reinforce the agency's commitment to ensuring that only scientifically valid projects are permitted, while streamlining the EFP/SRP process and alleviating some of the time burden put on EFP applicants and researchers for obtaining an EFP or SRP.

Issues for Long-term Policy Consideration

Financial Assistance Programs

In order to obtain an EFP, every applicant requesting financial assistance from NOAA Fisheries is subjected to three stages under current NOAA Fisheries regulations and NEPA: The process of obtaining approval for financial assistance, the process of requiring a permit from NOAA Fisheries authorizing the exempted fishing activity, and the process of intra-agency (NOAA) review of a NEPA document analyzing the impacts of the activity on the environment, as required of all Federal government agencies under NEPA. At present, none of these stages can be changed by the agency. However, the efficiency of the respective processes can be improved. For example, currently, within NOAA Fisheries there is an intra-agency coordination issue that contributes to EFP applicants' frustrations as they await receipt of their permits. As explained above, in addition to a permit, many EFP applicants request financial assistance in order to conduct their proposed EFP activities. The result is that a number of applicants "stand in line" twice; once for financial assistance and, after they receive it, a second time in a slower "line" for the permit.

Furthermore, projects receiving financial assistance from a Federal government agency, including NOAA Fisheries, could be subject to NEPA requirements. Although the manner in which NEPA is applied to NOAA financial assistance programs as a whole has not yet been fully resolved, front-loading the NEPA document at this financial assistance stage is a possibility.

Sale of Fish

There continues to be debate within the agency, among members of the fishing industry, environmental groups, and the public about the sale of fish obtained during research activities. It should be clear that an exempted *fishing* permit authorizes fishing and that a vessel owner with such a permit may retain and sell fish caught as authorized by the permit. The concern is that SRPs and LOAs may be used in order to extend the fishing season for restricted species or in closed areas, since part of a fisher's or researcher's compensation may be in the form of the keeping for sale of any catch (Note: catch from NOAA research vessels is not sold). Currently, NOAA Fisheries has no regulations that address the sale of these fish.

An option to alleviate this problem is to pay the operators of chartered research vessels directly rather than having them receive compensation through the sale of their catch. This option would likely increase the cost of research and may limit it as new sources of funding or additional appropriated funds would be needed to substitute for the value of the foregone landings from research catches. The question that this raises is, "What does one do with the dead fish?" The dilemma is, if one sells his/her catch rather than discarding it, "Does this promote an increase in requests for permits to conduct exempted activity under the semblance of research or gear testing?" This is a topic that warrants further consideration and may be addressed through rulemaking.

Bycatch Technology

The Magnuson-Stevens Act exempts from its definition of "fishing" (and, therefore, the jurisdiction of NOAA Fisheries to regulate the activity) "any scientific research activity which is conducted by a scientific research vessel." However, the Magnuson-Stevens Act does not offer further definitions for "scientific research activity" or "scientific research vessel." NOAA Fisheries has defined these terms in the regulations at 50 CFR 600.10. The definition at § 600.10 contains a specific exclusion: "Scientific research activity does not include . . . the testing of fishing gear." The phrase "the testing of fishing gear" (or "gear testing") is not defined or explained further and NOAA Fisheries has generally interpreted the term to include most fishing gear-based research. Thus, any proposed research that focuses on differences between gear (as in the use of a control and experimental gear design), no matter the intent of the overall research program, has been generally considered to be gear testing and, therefore, not a scientific research activity.

However, certain implications of this interpretation have become clear over the last year: The majority of fishing-related research activities being conducted in the Northeast, for example, for which the researchers have applied to NOAA Fisheries for either an EFP or for an LOA, are focused on developing methods (primarily through changes to fishing gear) that reduce bycatch. Bycatch is one of several issues that the § 600.10 definition includes in a list of possible "at-sea scientific fishery investigations" which meet the criteria for a scientific research activity. Furthermore, NOAA Fisheries is committed to developing ways to reduce bycatch, as Congress clearly intended when it added National Standard 9 to the Magnuson-Stevens Act through passage of the Sustainable Fisheries Act in 1996. However, the nature of these experiments has been previously interpreted to fall under the gear testing exclusion to the scientific research exemption and, therefore, has required that the researchers apply for and receive an EFP before

conducting their research. The effect has been to unnecessarily delay research on fishing gear modifications intended to reduce or eliminate bycatch or to minimize the impacts of fishing gear on essential fish habitat. By revising and clarifying the regulations to define the type of gear experiments that would be considered scientific research rather than gear testing, NOAA Fisheries would facilitate much needed gear-based bycatch reduction, habitat gear-impact mitigation research, and research designed to address other issues important to improving fisheries management, which we believe is well within the intent of Congress as expressed in the 1996 amendments to the Magnuson-Stevens Act.

Through nationally coordinated proposed and final rulemaking, NOAA Fisheries is considering modifications to EFP definitions, adding new definitions, revising existing definitions for certain regulatory terms, making technical changes, and amending the requirement to publish notice of EFPs in the *Federal Register*. Definitions could include compensation fishing, gear testing, scientific research activities, vessel observers, exempted fishing, exempted educational activities, and options for public comment. Rulemaking would clarify the terminology and applicability of EFPs and will take at least six months. NOAA Fisheries has developed a draft proposed rule to clarify or amend, as appropriate, the regulations concerning scientific research activities, including expanding the definition of a scientific research activity to include some types of fishing gear-based research previously considered to be gear testing and, therefore, excluded from the definition of scientific research activity.